

No. 16037 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard  
Pond Builders, Inc., Bankrupt,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division

FILED

JUL - 8 1958

PAUL P. O'BRIEN, CLERK



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Court of Appeals  
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Appellant,

vs.

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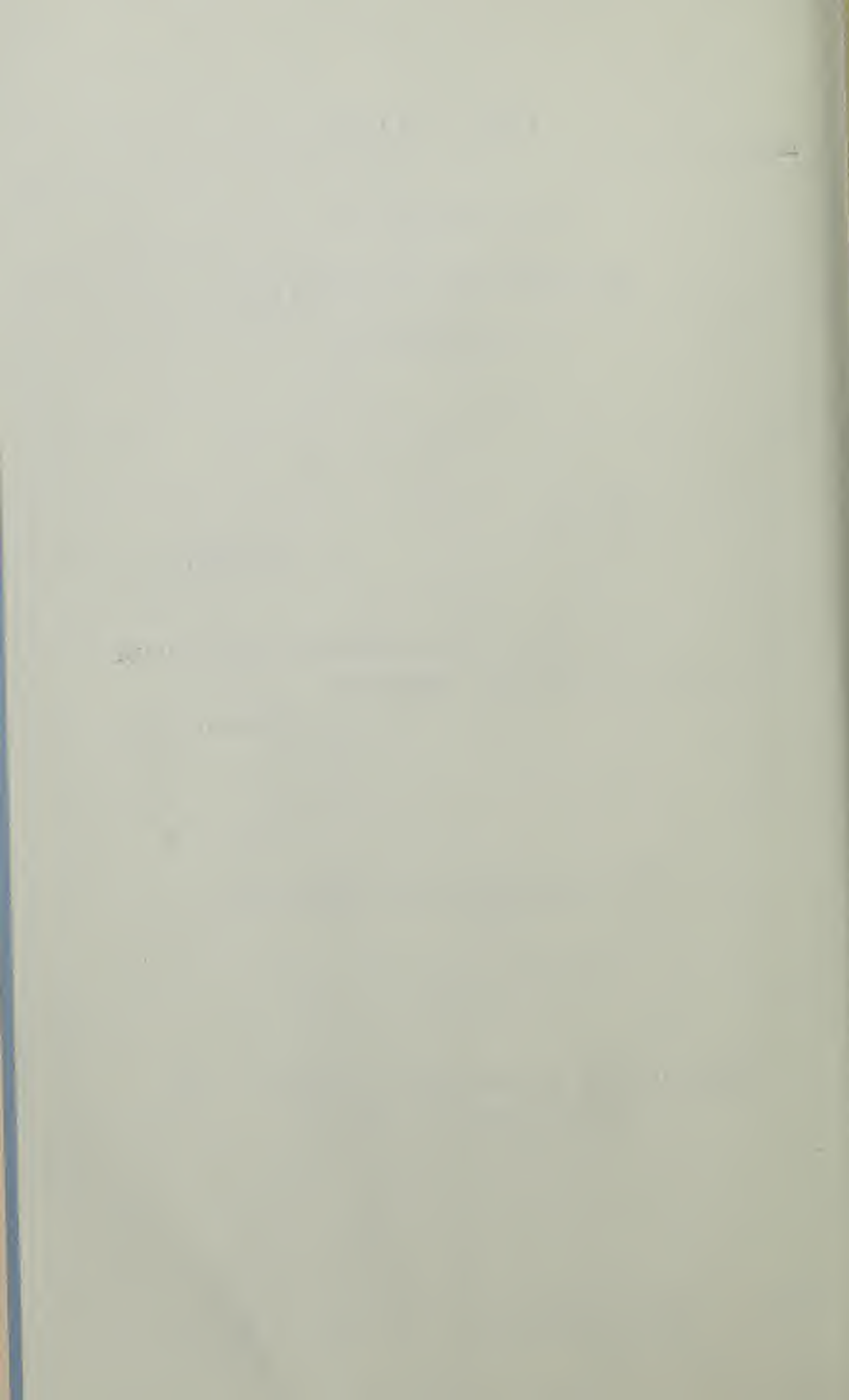
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

EDGAR C. KELLER,  
302 Katz Building,  
San Bernardino, California.

For Appellee:

TONY GERAM,  
WILLIAM TIERNAN,  
16921 Lerner Lane,  
Fontana, California.

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In the United States District Court, Southern  
District of California, Central Division

In Bankruptcy No. 76443-PH

In the Matter of:

MALLARD POND BUILDERS, INC., a Corpora-  
tion,

Bankrupt.

### REFEREE'S DECISION

To: William J. Tiernan and Tony Geram, attorneys  
for the Trustee. Edgar C. Keller, attorney for  
Hansen Sargent Lumber Company, and T. F.  
Korherr.

On April 24, 1957, the Trustee, filed his Petition  
for Order to Show Cause re: Sale free and clear of  
liens and the Order thereon was duly issued under  
date of April 24, 1957, directed to various lien  
claimants, including Hansen Sargent Lumber Com-  
pany and T. F. Korherr. Thereafter, on the 25th  
day of April, 1957, the said Hansen Sargent Lumber  
Company and T. F. Korherr filed their answer to  
the foregoing Petition. That on the 25th day of  
April, 1957, a Stipulation was entered into by the  
respective parties to the effect that the parties  
agreed to submit the matter upon a Stipulation of  
Facts in writing to the Court. That, thereafter, it  
was verbally agreed by the parties that in lieu of an  
agreed "Stipulation of Facts" in writing the re-  
spective parties would set forth the facts in their  
various memoranda to be subsequently filed. That,

while, the said facts as set forth in the memoranda of Points and Authorities did not completely cover all of the facts, the Court has sufficient knowledge, gathered from the various memoranda, so submitted, to make its decision. [2\*]

Therefore, in absence of any further Stipulated facts, the Court decides the matter as follows:

As to Hansen Sargent Lumber Company, the Court has no doubt that the said lumber company was a materialman as to the materials furnished to the owner of 33 houses; that while there may be some question that said lumber company took the necessary steps to protect and preserve their lien rights, within the time provided for by the mechanic lien law of the State of California, as to most of the houses, they did, however, follow the alternative procedure provided by the mechanic lien law, to wit: Section 1190.1 (h) C. C. P., to wit: by "Stop Notice." The "Stop Notice" was duly served within the time, and the appropriate bond, per said Section 1190.1 (h) was given at which time there were ample funds in the possession of the lending company, to more than cover the lumber company claim. Thereafter, the lumber company filed an action, within the time provided, for the foreclosure, on both their mechanics lien notice, and on their stop notice, being San Bernardino Municipal Court action No. 12564.

Therefore, as to the Hansen Sargent Lumber Company, it is my opinion that the lien is good, as a

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

statutory lien against the funds in the hands of the trustee for the full amount of the balance of their claim of \$2,547.62 plus \$2.80 cost of filing lien notice, plus \$19.55 court cost incurred in their action.

As to T. F. Korherr, he served a "Stop Notice" on "Perpetual" on November 6, 1956. It is my conclusion that Korherr was a contractor within the meaning of Section 1190.1 (h) C. C. P., and, therefore, could not avail himself of the "Stop Notice" to protect his lien rights. His written contract for the floor work was directly with the owner Mallard Pond Builders, Inc. (see Exhibit "I" trustee's memorandum of points and authorities). However, on October 10, 1956, Korherr recorded seven notices of mechanics liens on lots 8, 9, 20, 23, 65, 7 and 21, all within the 60 day period allowed a contractor. No notice of completion was ever recorded as to lots 8, 7 and 21. [3]

Later, and within the 90 day period allowed for filing action to foreclose, Korherr filed his action "case 13010 Municipal Court San Bernardino." Whether or not lis pendens of Korherr's action or of the Hansen Sargent Lumber Company was filed in the recorder's office, as now provided by the mechanics' lien law, I do not know, but for the purpose of these proceedings must assume that such jurisdictional steps were duly taken.

If Korherr did take such necessary steps to protect his mechanics' lien, I believe that his statutory lien is good, and can be enforced, after bankruptcy,

provided for under Section 67b of the Act, as to the foregoing lots 8, 20, 23, 65, 7, 21 and 9.

Further computation shows that the amounts still due and to be paid through lending agency was as follows:

Lot 8 .....	\$ 416.50
Lot 20 .....	416.50
Lot 23 .....	416.50
Lot 65 .....	416.50
Lot 6 .....	381.00
Lot 21 .....	381.00
Lot 9 .....	81.00
<hr/>	
Total .....	\$2,509.00

I believe, that due to the fact, that Korherr took all of the necessary steps to effect his liens, as to the above lots, independent of his alternative attempt under the Stop Notice that he has a good statutory lien in the foregoing amount of \$2,509.00.

I am not deciding, however, that in the event other lien claimants who assert their liens and have complied with Section 1194.1 by segregating the amounts claimed against each lot, should not be preferred, as against both Hansen Sargent Lumber Company and T. F. Korherr, who have not complied with said section.

Neither am I deciding as to the priority under Section 64 of the Bankruptcy Act.



Will you, therefore, the respective attorneys for the trustee, and for the above creditors, consider the thoughts and conclusions arrived at herein, and if you agree, as to my conclusions, prepare, file and [4] serve Findings, Conclusions and Order to conform therewith.

On the other hand, if the parties do not agree as to my Findings of Fact, and desire further evidence concerning the facts, will you please so indicate, otherwise, my conclusions are as above indicated.

Dated at San Bernardino, California, October 1, 1957.

/s/ OLIVER M. CHARLEVILLE,  
Referee in Bankruptcy.

[Endorsed]: Filed November 1, 1957. [5]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO STOP NOTICES

On April 24, 1957, the Trustee filed his petition for Order to Show Cause re: Sale free and clear of liens and the Order thereon was duly issued under date of April 24, 1957, directed to various lien claimants, including Hansen Sargent Lumber Company and T. F. Korherr. Thereafter, on the 25th day of April, 1957, the said Hansen Sargent Lumber

Company and T. F. Korherr filed their answer to the foregoing Petition. That on the 25th day of April, 1957, a Stipulation was entered into by the respective parties to the effect that the parties agreed to submit the matter upon a Stipulation of Facts in writing to the Court. That, thereafter, it was verbally agreed by the parties that in lieu of an agreed "Stipulation of Facts" in writing the respective parties would set forth the facts in their various memoranda to be subsequently filed. That, while, the parties have filed memoranda of points and authorities, in addition the parties, through their attorneys, have set forth additional facts by way of oral argument at several hearings held before the referee, and the court now has sufficient knowledge gathered [6] from the memoranda and oral argument, and being fully advised in the premises, said cause being finally submitted, now makes the following:

#### Findings of Fact

1. That the claimant, Hansen Sargent Lumber Company, a copartnership, was a materialman as to the materials furnished the Bankrupt for the construction of a work of improvement on each of the following lots in Tract 4672, County of San Bernardino, State of California; 6, 7, 8 and 9; that said real property was then owned by the bankrupt, Mallard Pond Builders, Inc., a corporation.

2. That the balance of the value of the materials furnished by the claimant, Hansen Sargent Lumber

Company, to the bankrupt for such construction work on said real property was and is the sum of \$2,547.62, such materials being furnished the bankrupt from February 13, through August 3rd, 1956.

3. On or about August 13, 1956, pursuant to the provisions of Section 1190.1 of the California Code of Civil procedure, the claimant, Hansen Sargent Lumber Company, served written notice termed a "Stop Notice" on Perpetual Savings and Loan Association of Beverly Hills, as to Lots 6, 7, 8 and 9, of Tract 4672, for the withholding of funds being loaned to the bankrupt by said Association for building construction by the bankrupt as to said real property, said funds being still in the hands of said lender, and said stop notice requested that the sum of \$2,547.62 be withheld from bankrupt, being the balance of the value of the materials furnished by the said claimant to the bankrupt for work of improvement as to the aforementioned real property.

4. The stop notice above described and filed by Hansen Sargent Lumber Company was filed within the time provided by law for such remedy, and said claimant also filed with Perpetual Savings and Loan Association of Beverly Hills a bond as required [7] by Section 1190.1 of the California Code of Civil Procedure.

5. That at the time of the service of said Stop Notice and bond on Perpetual Savings and Loan Association of Beverly Hills, said Association had on

hand loan funds to be paid the bankrupt for work of improvement on said real property in excess of the amount set forth in the stop notice of Hansen Sargent Lumber Company.

6. That pursuant to order of this court all of the loan funds due the bankrupt and in the possession of Perpetual Savings and Loan Association of Beverly Hills at the time of the service of the stop notice of Hansen Sargent Lumber Company have been paid over to the Trustee in Bankruptcy, subject to determination by this court of the validity of such stop notice, and the stop notice of claimant T. F. Korherr.

7. On November 13, 1956, Hansen Sargent filed action No. 12564 in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California, naming bankrupt, Perpetual Savings and Loan Association of Beverly Hills and fictitious defendants as defendants. Said action was on the aforementioned Stop Notice and to foreclose a Mechanic's Lien founded on the same claim as said stop notice. This action was within the time provided by law for the bringing of such foreclosure action as to said stop notice.

8. The court costs of such action incurred by the plaintiff, Hansen Sargent Lumber Company, are \$19.55, and said claimant has also incurred \$2.80 cost in the filing of said mechanic's lien.

9. That between February 27, 1956, and October 5, 1956, T. F. Korherr, who at all times herein men-



tioned was and now is a flooring contractor, duly licensed as such under the laws of the State of California, pursuant to written contract with the bankrupt, furnished labor and materials for the flooring of [8] thirty-three (33) houses on the real property owned by the bankrupt. The reasonable and agreed value of said labor and material was and is the sum of \$13,046.50. Korherr was paid \$10,537.20 thereof, but the balance of \$2,509.30 has not been paid.

10. (a) On or about November 5, 1956, claimant T. F. Korherr served written notice, termed a "stop notice," on Perpetual Savings and Loan Association of Beverly Hills pursuant to the provisions of Section 1190.1 of the California Code of Civil Procedure, wherein he requested the withholding of funds being loaned to the bankrupt by said association for building construction by the bankrupt as to said real property, in the sum of \$2,509.30, being the balance of the value of labor and materials furnished by said claimant to the bankrupt for work of improvement as to said real property. Said stop notice was filed within the time provided by law for such remedy, if available to claimant, and said claimant also filed with said association a bond as required by Section 1190.1 of the California Code of Civil Procedure.

(b) At the time of service of said stop notice and bond, said association had on hand loan funds to be paid to the bankrupt for work of improvement on said real property in the excess of the sum of the amounts set forth in the stop notice of Hansen

Sargent Lumber Company aforementioned and claimant T. F. Korherr.

(c) In January 23, 1957, Korherr filed action No. 13165 in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California, naming said association and fictitious defendants as defendants. Said action was on the aforementioned stop notice. This action was within the time provided by law for the bringing of such action on said stop notice, if available to claimant. Court costs in the sum in excess of \$25.00 have been incurred by claimant Korherr in such action and that action to foreclose mechanic's liens herein referred to.

(d) The bankrupt entered into no general contract relative to the construction aforementioned, but entered into numerous individual contracts with plumbing contractors, flooring contractors, electrical contractors, sheet metal contractors, etc., and materialmen, similar to and including the contract into which it [9] entered with claimant T. F. Korherr. The bankrupt employed one Stan Schmidt to supervise all of the construction; said Stan Schmidt was the holder of a general contractor's license issued by the State of California and was designated by the bankrupt as its responsible managing employee.

11. That the Trustee has in his possession funds paid over to him by Perpetual Savings and Loan Association of Beverly Hills, subject to Stop Notice of Hansen Sargent Lumber Company and that said

claimant is justly entitled to the full amount of his claim set forth in said Stop Notice, in the sum of \$2,547.62 together with \$19.55 court costs and \$2.80 mechanic's lien filing costs, all of which should be paid by the Trustee out of the said funds paid over to him by the lending institution, Perpetual Savings and Loan Association of Beverly Hills. That the remaining amount of such funds are part of the estate of the bankrupt subject to the claims of general creditors.

12. That on October 10, 1956, Korherr recorded mechanic's liens on Lots 8, 9, 20, 23, 65, 7 and 21, having furnished labor and materials in the value of \$416.50 as to Lot 8; \$416.50 as to Lot 20; \$416.50 as to Lot 23; \$416.50 as to Lot 65; \$381.00 as to Lot 6; \$381.00 as to Lot 21, and \$81.00 as to Lot 9. That said liens were filed in the time provided by law.

13. That on January 8, 1957, the claimant, T. F. Korherr, filed action No. 13010, in the Municipal Court of San Bernardino Judicial District, State of California, naming bankrupt and fictitious defendants as defendants. That said action of foreclosure was within the time provided by law for the bringing of such suit.

14. That the claimant, T. F. Korherr, has valid mechanic's liens in the sums set forth therein as to each of lots 8, 9, 6, 20, 21, 23, 65, and that said lien rights in such sums set forth in said liens attach to the proceeds the Trustee has received for the equity of the estate as to each of such lots as a result

of the recent sale of said real property by the Trustee. [10]

15. That the right of the claimant, T. F. Korherr, to have said mechanic's liens satisfied out of the proceeds received by the Trustee from the sale of the real property of the estate, attributable to said lots, should be held in abeyance pending the determination by this court of the right of other claimants contending for mechanic's liens as to each of these lots.

From the foregoing findings of fact, the court derives and makes the following:

#### Conclusions of Law

1. That the claimant, Hansen Sargent Lumber Company, is a materialman and has a valid right, by virtue of his Stop Notice, remedy validly and properly exercised, to the sum of \$2,547.62, plus \$19.55 court costs and \$2.80 costs of filing mechanic's lien, all of which should be paid out of the funds paid over to the Trustee by the lending institution, Perpetual Savings & Loan Association of Beverly Hills.

2. That the claimant, T. F. Korherr, is a contractor and therefore not entitled to avail himself of the Stop Notice remedy; that therefore Stop Notice of said claimant is invalid and imposes no claim or lien upon the funds paid over to the Trustee by the lending institution, Perpetual Savings and Loan Association of Beverly Hills.



3. That the Trustee shall make available for the satisfaction of general creditors claims all of the funds paid over to him by the lending institution, Perpetual Savings and Loan Association of Beverly Hills, not required to satisfy the sums due Hansen Sargent Lumber Company by virtue of its Stop Notice and costs incurred therein.

4. That the claimant, T. F. Korherr, has valid mechanic's liens in the sums set forth therein as to each of lots 6, 8, 9, 20, 21, 24, 65 of Tract No. 4672, and that such liens attach to the proceeds attributable to each such lot derived by the Trustee from the sale of such real property belonging to the bankrupt.

5. That the right of the claimant, T. F. Korherr, to have such mechanic's liens satisfied out of the proceeds received by the Trustee from the sale of the real property of the estate attributable to said lots, shall be held in [11] abeyance pending the determination by this court of the rights of other claimants contending for mechanic's liens as to each of these lots.

Dated: 11/13, 1957.

/s/ OLIVER M. CHARLEVILLE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 17, 1957. [12]

In the United States District Court, Southern  
District of California, Central Division

Bankruptcy No. 76443-PH

In the Matter of:

MALLARD POND BUILDERS, INC., a Corpora-  
tion,

Bankrupt.

### JUDGMENT AS TO STOP NOTICES

On April 24, 1957, the Trustee filed his petition for Order to Show Cause re: Sale free and clear of liens and the Order thereon was duly issued under date of April 24, 1957, directed to various lien claimants, including Hansen Sargent Lumber Company and T. F. Korherr. Thereafter, on the 25th day of April, 1957, the said Hansen Sargent Lumber Company and T. F. Korherr filed their answer to the foregoing Petition, setting forth their claims to portions of building loan funds in the hands of Perpetual Savings and Loan Association of Beverly Hills to be paid the bankrupt under agreement between the lender and the bankrupt. These claims were based on Stop Notices served by Hansen Sargent Lumber Company and T. F. Korherr on the lender. That on the 25th of April, 1957, a Stipulation was entered into by the respective parties to the effect that the parties agreed to submit the matter upon a Stipulation of Facts in writing to the Court: That, thereafter, it was verbally

agreed by the parties that in lieu of an agreed [14] "Stipulation of Facts" in writing, the respective parties would set forth the facts in their various memoranda to be subsequently filed. That the parties have filed such memoranda of points and authorities, and, in addition, the parties through their attorneys have set forth additional facts by way of oral argument before this Court, and the cause having been submitted for decision, and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law,

**It Is Ordered, Adjudged and Decreed**

1. That the claimant, Hansen Sargent Lumber Company, is a materialman and has a valid right, by virtue of its Stop Notice, validly and properly exercised, to the sum of \$2,547.62, plus \$19.55 court costs and \$2.80 for costs of filing a mechanic's lien, all of which sums shall be paid out of the building loan funds transferred to the Trustee by the lending institution, Perpetual Savings and Loan Association of Beverly Hills.

2. That the claimant, T. F. Korherr, is a contractor and therefore not entitled to avail himself of the Stop Notice remedy. That therefore the Stop Notice of said claimant is invalid and imposes no claim or lien upon the building loan funds paid over to the Trustee by the lending institution, Perpetual Savings and Loan Association of Beverly Hills.

3. That the Trustee shall make available for the satisfaction of the claims of general creditors all of the building loan funds transferred to him by Perpetual Savings and Loan Association of Beverly Hills not required to satisfy the sums due Hansen Sargent Lumber Company by virtue of its Stop Notice and the costs incurred therefor.

4. That the claimant, T. F. Korherr, has valid mechanic's liens in the sums set forth therein as to each of Lots 6, 8, 9, 20, 21, 24 and 65 of Tract No. 4672, and that said liens attach to the proceeds attributable to each such Lot derived by the [15] Trustee from the sale of such real property.

5. That the right of the claimant, T. F. Korherr, to have such mechanic's liens satisfied out of the proceeds attributable to each such lot derived by the Trustee from the sale of such real property shall be held in abeyance and subject to the determination by this court of the rights of other claimants contending for mechanic's liens as to each of these lots.

Dated: 11/13, 1957.

/s/ OLIVER M. CHARLEVILLE.

[Endorsed]: Filed November 13, 1957. [16]



[Title of District Court and Cause.]

ORDER ON REVIEW OF REFEREE'S ORDER,  
DATED NOVEMBER 13, 1957

The learned Referee has determined that T. F. Korherr, the petitioner, is a contractor as that term is used in Secs. 1181 and 1190.1 of the California Code of Civil Procedure, and as such is not entitled to avail himself of the "Stop Notice" remedy authorized by Sec. 1190.1. Petitioner feeling himself aggrieved by that holding brought on the instant petition to review.

After hearing counsel, the referee's report is adopted.

April 2, 1958.

ALEXANDER BICKS,  
United States District Judge.

Certified true copy.

[Endorsed]: Filed and entered April 3, [17]  
1958.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that creditor claimant T. F. Korherr hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that Order

on Petition for Review entered in the above matter on April 3, 1958, and from the whole thereof.

Dated: April 29, 1958.

/s/ EDGAR C. KELLER,  
Attorney for T. F. Korherr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1958. [18]

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[Title of District Court and Cause.]

AGREED STATEMENT AS RECORD  
ON APPEAL

Inasmuch as the parties hereto believe that the questions presented by the appeal of T. F. Korherr to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause can be determined without an examination of all the pleadings, evidence, and proceedings in the District Court, including those before the Referee in Bankruptcy, the parties have prepared and signed a statement of the case showing how the questions arose and were decided in the District Court, and setting forth only such of the facts as are essential to the decision of the questions by the Court of Appeals.

The parties designate the following to be copied herewith as part of this Agreed Statement:

1. "Exhibit A" from Claimant's Statement of Facts and Memorandum of Points and Authorities,

which was admitted into evidence by stipulation in the proceedings before the Referee in Bankruptcy.

2. Referee's Decision.

3. Findings of Fact and Conclusions of [20] Law.

4. Judgment as to Stop Notices.

5. Judgment of District Court, with filing date.

6. Copy of Notice of Appeal, with filing date.

7. Statement of Points to be relied upon by appellant.

#### Facts

On September 12, 1955, the bankrupt entered into a series of building loan agreements with First Federal Savings and Loan Association of Beverly Hills, subsequently known as Perpetual Savings and Loan Association of Beverly Hills and herein referred to for the sake of brevity as "Perpetual." A copy of such agreement is marked "Exhibit A," attached hereto, and made a part hereof. Each of the other of such agreements was identical save for the lot number. Simultaneously with the execution of said loan agreements, the bankrupt executed standard notes and deeds of trust covering the lots affected by the loan agreements.

On or about March 5, 1956, the bankrupt entered into building loan agreements with Perpetual of a similar nature, save for the amounts and the lots involved. All of the lots in connection with which the loan agreements herein referred to were made

were located in the County of San Bernardino, California.

The deeds of trust executed at the time the loan agreements were executed were subsequent in time to deeds of trust of which one Fred Loehr was beneficiary, but said Fred Loehr subordinated his deeds of trust to those referred to hereinabove of which Perpetual was beneficiary. Thus, for most purposes, the bankrupt may be considered the owner of the property and Perpetual the holder of the first deeds of trust.

Following the execution of each of these series of loan agreements referred to above, the bankrupt commenced construction of houses and garages on the lots for which loans had been obtained. The proceeds of the loans were not disbursed, however, except as [21] progress payments during the course of the construction in accordance with the schedules set forth in the agreements.

Pursuant to a contract made directly with the bankrupt, appellant T. F. Korherr, a licensed flooring contractor, furnished labor and materials for the flooring of houses on the aforementioned lots. Appellant has never been licensed as a general contractor. He did not contract to do any work on the subject property other than the flooring, and he did no work thereon other than flooring. Korherr was paid in part, but a balance of \$2,509.30 was never paid to him. Within the time required by law, and prior to the adjudication in bankruptcy, appellant filed with Perpetual a stop notice accom-



panied by a bond pursuant to Section 1190.1 (h) of the California Code of Civil Procedure. Thereafter, and within the time required by law, petitioner commenced an action in the California Courts on this stop notice. Said stop notice, bond, and suit were properly and timely filed as provided by law for such remedy, if such remedy was properly available to appellant; whether such remedy was available to appellant is the issue on this appeal.

The bankrupt entered into no general contract relative to the construction aforementioned but entered into numerous individual contracts with plumbing contractors, flooring contractors, electrical contractors, sheet metal contractors, etc., and materialmen similar to and including the contract into which it entered with appellant. The bankrupt employed one Stan Schmidt to supervise all of the construction; said Stan Schmidt was the holder of a general contractor's license issued by the State of California and was designated by the bankrupt as its responsible managing employee.

At the time that appellant served his written stop notice on Perpetual, Perpetual held funds in the construction loan account in an amount sufficient to satisfy all stop notice claims, namely that of appellant and that of Hansen Sargent Lumber Company, no [22] other claim having been filed at any time.

The three paragraphs immediately preceding this one represent a summary of facts as found by the

Referee in his Findings of Fact, a copy of which is attached hereto. The parties accept as correct and adopt all of said Findings of Fact and incorporate them herein, but have summarized them merely for the convenience of the court.

### Proceedings

This matter first came before the Referee in Bankruptcy on a hearing on an Order to Show Cause pursuant to a petition by the Trustee in Bankruptcy. By that order, appellant herein together with Hansen Sargent Lumber Company and Perpetual Savings and Loan Association, were ordered to show cause why the funds held in the construction loan account by Perpetual should not be paid over to the Trustee in Bankruptcy. The Trustee's Petition alleged that the construction loan funds constituted an asset of the estate; that appellant and Hansen Sargent claimed an interest in the funds by reason of stop notices filed against same; but that the claims of appellant and Hansen Sargent were invalid under Sections 67 and 70 of the Bankruptcy Act.

Appellant and Hansen Sargent filed an Answer to the Trustee's Petition alleging, *inter alia*, that they claimed an interest in the funds by reason of their stop notices which had been filed, accompanied by bonds, and properly sued upon in state court, and denying that their claims were invalid. At the hearing on the Order to Show Cause it was orally stipulated that such facts as were set forth in a

Memorandum of Points and Authorities to be filed by Appellant and Hansen Sargent might be considered true unless the Trustee should object. Additional facts were received by the Referee subsequently without objection by either side, and there is no dispute now as to the facts. [23]

For the sake of convenience in administration, it was stipulated that Perpetual might pay to the Trustee the disputed funds and the Trustee would hold same in trust, subject to the claims of Hansen Sargent and appellant as they might be subsequently determined by the court.

Thereafter, the Referee filed a "Referee's Decision." Thereafter, Findings of Fact and Conclusions of Law were made, a copy of which is attached hereto, and "Judgment as to Stop Notice," was entered thereon. By his Decision, Conclusions, and Judgment, the Referee held that the stop notice filed by Hansen Sargent was valid and Hansen Sargent was entitled to that portion of the funds originally held by Perpetual equal to its stop notice claim and court costs, but that Appellant was a contractor within the meaning of the exclusionary provisions of CCP Section 1190.1 (h) and could not avail himself of the stop notice remedy.

Appellant filed a Petition for Review of the Referee's Order and Judgment. The District Court for the Southern District of Southern California made an order adopting the Referee's order. From this Order, Appellant prosecutes this appeal.

## Issues

The sole question before the court on this appeal is this: May a flooring contractor who contracts directly with an owner-builder to furnish labor and materials for flooring, on a project on which the owner-builder does not have a general contractor, avail himself of the stop notice remedy provided by California Code of Civil Procedure, Section 1190.1 (h) as to construction loan funds?

Dated: May 16, 1958.

/s/ EDGAR C. KELLER,  
Attorney for Claimant,  
Appellant.

W. J. TIERNAN and  
TONY GERAM,

By /s/ TONY GERAM,  
Attorneys for Trustee in  
Bankruptcy, Appellee.

[Endorsed]: Filed May 20, 1958. [24]

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[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE  
RELIED ON BY APPELLANT

In support of his Appeal herein, appellant T. F. Korherr will rely on the following points:

(1) The Referee erred in concluding and determining (Findings of Fact and Conclusions of Law,



page 5, line 25, et seq.; Judgment, page 2, line 16, et seq.) that appellant was a contractor.

(2) The Referee erred in concluding and determining (Findings of Fact and Conclusions of Law, page 5, line 25, et seq.; Judgment, page 2, line 16, et seq.) that a contractor is not entitled to avail himself of the stop notice remedy provided by California Code of Civil Procedure, Section 1190.1 (h).

(3) The Referee erred in concluding and determining impliedly, (Findings of Fact and Conclusions of Law, page 5, line 25, et seq.; Judgment, page 2, line 16, et seq.) that appellant was a contractor within the meaning of California Code of Civil Procedure, Section 1190.1 (h).

(4) The Referee erred in holding that appellant's stop notice was invalid and imposed no claim upon the building loan fund, and ordering accordingly. [26]

(5) The District Court erred in each of the above respects in approving and adopting the decision of the Referee.

Dated: May 16, 1958.

/s/ EDGAR C. KELLER,  
Attorney for Claimant,  
Appellant.

[Endorsed]: Filed May 20, 1958. [27]

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numebered 1 to 27, inclusive, containing the original:

Referee's Decision.

Findings of Fact and Conclusions of Law as to Stop Notices.

Judgment as to Stop Notices.

(Certified Copy) Order on Review of Referee's Order, dated November 13, 1957.

Notice of Appeal.

Agreed Statement as Record on Appeal.

Statement of Points to be relied on by Appellant.

B. "Exhibit A" from Claimant's Statement of Facts and Memorandum of Points and Authorities.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: May 26, 1958.

[Seal]

JOHN A. CHILDRESS,  
Clerk.

By /s/ WM. A. WHITE,  
Deputy Clerk.

[Endorsed]: No. 16037. United States Court of Appeals for the Ninth Circuit. T. F. Korherr, Appellant, vs. A. J. Bumb, Trustee in Bankruptcy of Mallard Pond Builders, Inc., Bankrupt, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed: May 27, 1958.

Docketed: June 2, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

